

LONE PINE TELEVISION, INC.

IBLA 99-249

Decided December 26, 2002

Appeal from a decision of the Ridgecrest, California, Field Office, Bureau of Land Management, increasing annual rental for communication site right-of-way. CACA 12457.

Reversed and remanded.

1. Administrative Procedure: Administrative Record--Appraisals--Communication Sites--Rent--Rights-of-Way: Appraisals

In challenging a BLM decision increasing rental pursuant to 43 CFR 2801.1-2(d) (7) (iv) for a communication site right-of-way, an appellant bears the burden of demonstrating by a preponderance of the evidence that BLM's appraisal methodology was erroneous, that BLM used inappropriate data or erred in its calculations, or that the annual rental arrived at by BLM deviated from the fair market value of the right-of-way. Where BLM issues a decision setting a communications site rental pursuant to 43 CFR 2803.1-2(d) (7) (iv), it must ensure that its decision is supported by a rational basis and that such basis is reflected in the administrative record accompanying the decision.

2. Administrative Procedure: Administrative Record--Appraisals--Communication Sites--Rent--Rights-of-Way: Appraisals

A BLM decision increasing rent above the schedule rate based upon an appraisal pursuant to 43 CFR 2801.1-2(d) (7) (iv) will be reversed when that appraisal fails to establish sufficient familiarity with the communication site being appraised and the communication uses thereon or to disclose information regarding the comparable data utilized, thereby precluding

independent verification of the lease data, effective challenge as to the accuracy of the data and appraisal, and meaningful review by the Board.

3. Appraisals--Communication Sites--Rent--Rights-of-Way:
Appraisals

An appraisal establishing fair market rental value rental of a Federal communication site right-of-way grant is properly prepared under standards governing Federal appraisals; such an appraisal is not affected by the measure of schedule rent established at 43 CFR 2803.1-2(d) (3).

4. Communication Sites--Federal Land Policy and Management Act of 1976: Rights-of-Way--Rights of Way:
Generally

Pursuant to 43 CFR 2803.1-2(b) (2) (ii), a reduction or waiver of rental for a communication site right-of-way may be granted when the holder provides without charge, or at a reduced rate, a valuable benefit to the public. BLM may reduce or waive rental payments for a communication site right-of-way pursuant to 43 CFR 2803.1-2(b) (2) (iv) if BLM determines that the imposition of the fair market rental value would cause undue hardship on the right-of-way holder and it is in the public interest to do so.

APPEARANCES: Bruce Branson, Lone Pine, California, for appellant; Hector A. Villalobos, Field Manager, Ridgecrest, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HEMMER

Lone Pine Television, Inc. (LPT), has appealed from a March 1, 1999, decision of the Acting Field Manager, Ridgecrest, California, Field Office, Bureau of Land Management (BLM). BLM's decision increased LPT's 1999 communication site rental on Cerro Gordo Peak, in Inyo County, California, from the rental schedule rate, originally calculated at \$829.67, to a rate of \$11,000. BLM's decision was based on an appraisal prepared by David J. Yerke, Certified General Real Estate Appraiser, which was reviewed and approved by Rod K. Smrcka of the California State Office Appraisal Staff, BLM, on February 11, 1998. We reverse and remand BLM's decision for action consistent with the findings below.

Section 504(g) of the Federal Land Policy and Management Act, as amended, 43 U.S.C. § 1764(g) (1994) (FLPMA), requires the holder of a

right-of-way grant to pay annually, in advance, its "fair market value" as determined by BLM. 43 U.S.C. § 1764(g) (1994); 43 CFR 2803.1-2(a); see, e.g., Michael D. Dahmer, 132 IBLA 17, 24 (1995), and citations therein. Prior to 1995 amendments to Departmental regulations at 43 CFR 2803.1-2 pertaining to right-of-way rentals, BLM determined the fair market value of all communication site rights-of-way using the comparable lease method of appraisal. E.g., Michael D. Dahmer, 132 IBLA at 24.

Effective December 13, 1995, the Department amended its right-of-way rental regulations to provide that "annual rental payment for communication uses" would be "based on rental payment schedules." 43 CFR 2803.1-2(d). In promulgating the schedule rules, the Department explained that the purpose was to establish telecommunications site rentals that more closely approximated fair market value. See 60 FR 57057 (Nov. 13, 1995). According to the rulemaking, BLM rentals were out of date because appraisals were costly to update and, in any event, statutory language in appropriations bills from 1990 to 1994 had limited the Secretary's authority to raise rents. 60 FR 57058. Similar problems afflicted rentals imposed for Federal lands managed by the U.S. Forest Service of the Department of Agriculture (FS).

The final rule explains that at a Congressional hearing held in 1994, the Government Accounting Office (GAO)

testified that fees being charged for the communication sites on Federal lands are, in most instances, significantly below fair market value. The Committee strongly encouraged BLM and FS to promulgate rental schedules as soon as possible.

The GAO report [GAO/RCED-94-248] stated that FS rental payments are based on an outdated formula established 40 years ago, and that BLM rents are based on out-of-date appraisals. GAO recognized that agency efforts to raise rents had been prohibited by Congress, and warned that if these prohibitions continued, the Federal government would not obtain fair market value for communications sites for many years.

60 FR 57059.

The rule explained that Congress had directed the Secretaries of Agriculture and Interior to establish a Radio and Television Use Fee Advisory Committee to make recommendations for the adoption of rental schedules. 60 FR 57058-59. FS had published a proposed rule which established rentals higher than those recommended by the Committee. BLM published a proposed rule incorporating Committee recommendations and responding to comments made to the FS proposal. Id. Accordingly, FS determined to publish a similar schedule rental rule, and "it was agreed that the BLM proposal would be the basis for the FS's final notice." Id.

The schedule established by the rule identified values for 11 categories of telecommunications use. It provided for annual adjustment

based on the Consumer Price Index (CPI). ^{1/} BLM identified the intent behind the rulemaking: "BLM intends the approach taken in developing the final schedule to achieve a reasonable estimate of fair market value, and believes that it succeeds in doing so." 60 FR at 57060. The effect was to "eliminat[e] most individual appraisals" and provide for annual updates to avoid the "agency costs of setting and updating rental payments." 60 FR 57059. BLM acknowledged that appraisals "may provide a more accurate indication" of fair market value on a particular site, but stressed that the "costs of performing individual appraisals * * * would be enormous" and create "pressure to increase the rents charged to make up for those costs." 60 FR 57060.

The rulemaking expressly addressed rentals in communities with low populations, in response to comments that the proposed rents were too high and would adversely affect small entities.

In response to the comments, BLM made a number of changes * * *. The schedule in its final form more closely reflects market rent and minimizes impacts on holders of sites serving smaller population areas. Rents will correlate with the population * * * where the facility is situated or that it serves, or both, rather than distant communities served by the facility. * * * [T]he final schedule that BLM is adopting more directly correlates to the population of the local community where the facility is situated.

60 FR 57059-60. ^{2/}

The amended regulations include within the schedule rent charges for all uses at multi-user sites. Schedule rent is calculated as follows:

Base rent for authorizations that include more than one user will be based on the use in the facility with the highest rent as shown on the schedule. An additional amount will be

^{1/} The rental payment schedules are adjusted annually "based on the U.S. Department of Labor Consumer Price Index for All Urban Consumers (CPI-U, U.S. City Average, published in July of each year), and Rannally Metro Area population rankings. Annual adjustments based on the CPI-U will be limited to no more than 5 percent. The rental schedule will be reviewed for possible update no later than 10 years after December 13, 1995, and at least every 10 years thereafter, to ensure that the schedule reflects fair market value." 43 CFR 2803.1-2(d)(2)(i).

^{2/} In the case of a facility that is not situated in or near, and does not serve, a community considered a Rannally Metro Area, i.e., a metropolitan area identified in the "Rand McNally Commercial Atlas and Marketing Guide," the schedule rental is based on the population of the "largest nearby community," as noted in the "Rand McNally Road Atlas." 60 FR 57062.

assessed based on 25 percent of the schedule rent for all other users.

43 CFR 2803.1-2(d) (3) . 3/

The 1995 amendments provide that, while annual rental should usually be determined by the rental schedule, "[o]ther methods may be used to set rental payments for communication uses" in prescribed circumstances. 43 CFR 2803.1-2(d) (7). This is true if the determining officer, with concurrence of the State Director, finds that an appraisal or other reasonable method supports a conclusion that the site should command a rental value of more than five times the schedule value, or that the communication site serves a population of one million or more and is more than \$10,000 above the schedule rent. 43 CFR 2803.1-2(d) (7) (iv). Where the schedule rental is not used, "comparative market surveys, appraisals, or other reasonable methods" may be used to determine rental value. 43 CFR 2803.1-2(e) (1) .

Since 1958, LPT has operated a telecommunications site on Cerro Gordo Peak in Inyo County, California, located roughly 15 miles from the community of Lone Pine, in the NE¹/₄ sec. 24, T. 16 S., R. 38 E., Mount Diablo Meridian. For 23 years, LPT operated on the site under a license from the Federal Communications Commission (FCC) and an agreement with a mining claim owner, on the erroneous belief that the mining claimant held rights to the site. On February 19, 1982, after a 1981 stock transfer, LPT's manager formally applied to BLM for a right-of-way grant. See Lone Pine Television, Inc., 113 IBLA 264 (1990). BLM granted the right-of-way on November 10, 1982, for a 30-year term, subject to a review at the end of 20 years from the date of the grant. (Term and Condition 7.) This review could occur as of November 10, 2002.

BLM initially assessed rental at \$1,000 per year "subject to adjustment by formal appraisal." (LPT Right-of-Way Grant dated Nov. 10, 1982.) In August 1987, BLM established a "fair market rental" of \$3,000 for the LPT site, based upon a June 24, 1987, appraisal. In Lone Pine Television, Inc., 113 IBLA at 264, the Board set aside and remanded BLM's decision "for insufficient analysis of the leases considered in the appraisal." On July 2, 1992, BLM issued a decision readjusting the fair market rental value of the right-of-way to \$4,914. That decision, however, was reversed by the Board in Lone Pine Television, Inc., IBLA 92-556 (Order dated Feb. 9, 1995). In that order, at 2, the Board held that the July 1992 decision "disclose[d] only BLM's conclusory determination * * * [and failed] to reveal any reasoned analysis in response to the problems previously noted by the Board in its [1990] decision remanding the matter for further review."

3/ In order for the holder to be liable for additional rental, a "secondary use" must be undertaken by a "tenant," rather than a "customer," as defined at 43 CFR 2800.0-5(bb) and (cc) .

BLM records reveal that LPT was billed for rentals in the amount of \$1,000 per year until 1992, when BLM billed LPT \$1,150. From 1993 through 1995, BLM billed LPT \$1,265 in rental.

On October 11, 1996, BLM notified LPT by letter that the 1995 regulatory amendments were in effect and requested that LPT complete a "Use Inventory Worksheet" for the Cerro Gordo Peak site, so that a rental rate could be calculated for the 1997 calendar year based on the rental payment schedule. On October 22, 1996, BLM received a user inventory worksheet from Bruce Branson, LPT representative, stating that LPT had "TV equip." on the site. On December 5, 1996, BLM completed a "Communication Site Rental Calculation Sheet" for LPT, listing its use as "television" and calculating rental from the 1997 schedule at \$1,236. ^{4/} On January 29, 1997, BLM issued a decision to LPT establishing rental in this amount, which was paid, with 1996 arrearages, on May 23, 1997.

On June 24, 1997, High Sierra Mobilfone notified BLM that it had relocated its "radio equipment" and would be operating from LPT's Cerro Gordo Peak facility "on a secondary basis." On September 23, 1997, LPT submitted a "User Inventory Worksheet" for calendar year 1998, indicating that LPT's "category of use" was "Cable TV" and that one other user, High Sierra Communications, occupied space in LPT's facility for "CMRS Paging Equip[.]" On October 22, 1997, Kathy Love, BLM employee, prepared a communication site rental calculation sheet for calendar year 1998 listing LPT's type of use as "Cable TV" and showing "High Sierra" as a tenant. The rental calculation sheet indicated that Love calculated a schedule rate of \$631.60 for LPT's "cable" use, and added an additional user fee of 25 percent of the schedule rent for CMRS use, or \$157.90, for a tenant. Total annual rental for 1998, calculated according to schedule, was therefore \$789.50, which was duly paid by LPT on December 24, 1997. ^{5/}

On October 22, 1998, Branson submitted a "User Inventory Worksheet" for calendar year 1999. It circled three uses in the "category of use" item: cable TV, broadcast translator (LPTV/LPFM), and microwave. Branson identified High Sierra Communications as a tenant, listing its use as "paging." On December 17, 1998, BLM calculated the schedule rent using the 1999 schedule under 43 CFR 2803.1-2(d)(3). BLM calculated the schedule rent based on three uses: (1) LPT's cable TV use at \$642.33; (2) the LPTV

^{4/} The 1997 schedule lists use categories that might pertain to a site holder having "TV equip." on site: television, cable television, broadcast translator (LPTV/LPFM), and microwave. In this instance, BLM calculated LPT's rental based upon the "television" category. See 1997 Rental Schedule for Communications Uses, Billing Year 1997.

^{5/} In 1998, BLM calculated LPT's rental under the "Cable TV" category, which was listed on the 1998 schedule for a rental of \$631.60, as opposed to the \$1,263.19 which would have been due had the category of use been classified as "television." No additional use was calculated either in 1997 or 1998.

use as an "additional use" at the schedule rate of \$107.06 X 25%, or \$26.76; and (3) a tenant fee for High Sierra's "CMRS" use at \$642.33 X 25%, or \$160.58, for a total of \$829.67. At the bottom of this document, however, BLM reported that a December 20, 1997, appraisal found rental value for the site to be \$11,000.

On March 1, 1999, BLM notified LPT by decision that, pursuant to 43 CFR 2803.1-2(d) (7), it was choosing to base LPT's rental on a new appraisal. According to BLM, the 1999 rental would be \$11,000, based on an appraisal prepared by David Yerke on December 20, 1997, and approved by a review appraiser and the Chief State Appraiser, BLM, on February 11, 1998. The BLM review appraiser's report approved Yerke's appraisal report, stating that the "appraiser's estimate of 'fair market rent'" for existing users on Cerro Gordo Peak was "reasonable and market supported." (Review Appraiser's Report at 8.)

The December 20, 1997, appraisal report provides the basis for BLM's March 1999 decision. The appraisal covers three communications sites located on Cerro Gordo Peak, including LPT's telecommunications right-of-way. The appraisal begins with a general description of telecommunications technology and describes the manner in which cellular communications has changed the industry. (Appraisal at 8-24.) Following this discussion, the appraisal provides a site analysis and site summary for the Cerro Gordo Peak location, a "highest and best use" statement, and a "fair market rental analysis." Id. at 25-44.

The fair market rental analysis section sets forth assumptions, based on the views of Carl Cory, "federal land use and telecommunication expert," pertinent to the appraiser's subsequent analysis. (Appraisal at 32.) According to the appraiser's characterization of Cory's view, the fair market rental of a telecommunications site is or should be influenced less by the type of use made by the telecommunications user, or by the population served, than by real estate values near large population centers. Id. at 32-33. ^{6/} The appraiser stated that an exception to the notion that use is not relevant to rental value would be made "for high-power broadcast stations and no-profit or low-profit users." Id. at 33-34. The appraiser discussed multiple-use and single-use sites and made various comments supporting the notion that one or the other would command more value. Parcel size is not critical to value, he concluded. Id. at 34. According to the appraiser, if a site serves as an interconnecting node in a network system, value is less a function of the "population served" than the site's role in the network. Id. On the other hand, "'[p]opulation served' can be a rental or value indicator only where 'serving the population' is actually the function of the site." Id.

^{6/} "Rents are probably higher in larger population areas because of the overall higher land values and larger, overall business potential." (Appraisal at 32.)

After setting forth this background, the appraiser analyzed two sets of market data for comparison with the Cerro Gordo sites. The first set is a group of 324 leases located in the Los Angeles Basin (LAB). (Appraisal at 34-35.) The second set consists of 280 mountaintop site leases located across the State of California, spanning the "depth and breadth" of the telecommunications market. Id. at 37. The appraiser provided no specific information about any of the private leases used for comparison, claiming that all such information was confidential. Id. at 6, 32.

In considering the LAB leases, "[n]o broadcast radio or TV lease information was collected." (Appraisal at 35.) Of the 324 leases Yerke surveyed in the LAB, 219 were cellular leases. Of the remaining 105 leases surveyed, Yerke rejected 24 "because of non-standard terms, age, or other unusual characteristics." Id. at 35. Yerke classified the remaining 81 leases into four groups based on the time period during which each became effective. Id. at 36, Table IV. He then derived average, median, high, and low annual rentals. According to Yerke's review of leases in the LAB, "[i]n the non-cellular category, 70% of the leases [fell] between \$4,200 to \$12,000 per year," with microwave users paying slightly higher rates than mobile radio leases. Id. at 36. Yerke's "overall conclusion" was that, in the LAB vicinity, "the typical or average rent paid * * * for all non-broadcast uses other than cellular (cell sites and enhancers) is about \$9,400 per year." Id. at 35.

For the second data set of 280 mountaintop leases, Yerke then selected 35 leases from 24 locations for "more detailed comparison with the subject property." (Appraisal at 37; quotation at 34.) This group of leases did not include FM/TV users, but included microwave, personal communications services (PCS), cellular, commercial mobile radio service (CMRS), and private mobile radio service (PMRS) users. Id. at 38. The appraiser indicated that "[t]he primary uses on the subject property are confined to microwave and FM broadcast use," and noted that the 35 leases encompassed "broad areas which may not all be comparable with the subject property." Id. at 40. Six of the 35 leases pertained to microwave sites. Id. at 39, Table V. The average rental for those six leases, according to the appraiser's calculations, was \$5,969. Id. The highest rental for microwave uses was \$9,600; the lowest rental was \$2,843. Id. The appraiser noted that "the lease commencement dates for these [six leases] began in the 1980's." Id. at 40. He noted that, "[a]fter sorting the telecommunication data a trend in the lease rates developed; the new leases were paying higher rent than the older data." Id. 7/

7/ The appraiser also relates consultations with real estate managers from Airtouch Cellular and Antenna Systems. (Appraisal at 37.) Antenna Systems is in the business of leasing telecommunications sites to telecommunications companies. Airtouch Cellular provides "wireless communications services to as many customers as possible." Id. Airtouch Cellular quoted an "average rental for the typical cellular site" at between \$9,000 and \$12,000 annually. Id. According to Antenna Systems, "the fixed rate for a rural telecommunications site is between \$7,200-\$12,000 annually," and

After this analysis of the two data bases, the appraiser chose "the most pertinent leases * * * for the three groups of telecommunications uses." (Appraisal at 40.) These leases included: (1) five microwave leases, id. at 41, Table VI; (2) five "FM/TV/Cellular" leases, id. at Table VII; and (3) five CMRS/PMRS leases, id. at 42, Table VIII. ^{8/} Table VI compares five leases deemed to be "comparable market data" for microwave leases.

The five leases used for direct comparison were chosen because they have the most common characteristics with the subject property from the entire data array. The lease commencement dates for these market data began in the late 1980's. Site sizes ranged from about 2,500 square feet to nearly four acres. The sites were unimproved at the commencement date and the lessee was responsible to create a usable site. Each lease has an annual adjustment provision, typically based upon a CPI index. Annual lease rates ranged from approximately \$3,000 to \$7,500.

(Appraisal at 41 (emphasis supplied).) Table VII lists "comparable market data" for FM/TV/Cellular. The appraisal notes that these leases have "[a]nnual lease rates rang[ing] from approximately \$12,000 to \$20,000." Id. Table VIII lists "comparable market data" for CMRS/PMRS. The appraisal notes that these leases have "[a]nnual lease rates rang[ing] from approximately" \$8,000 to \$30,000. Id. at 42.

In Tables IX, X, and XI, the appraiser compared these 15 leases with communications uses on Cerro Gordo Peak in terms of utilities, access, population served, and "traffic/corridor VPD [vehicles per day]." See Appraisal at 43-44. Based upon this data, the appraiser concluded: (1) All telecommunications leases in the LAB should command rental at or above \$9,000, and a range between \$12,000 and \$24,000 for cellular, microwave, and PCS would be reasonable. Id. at 44. (2) Analysis of a 35-lease subset within the mountaintop leases surveyed indicates rental averages of \$13,890 for cellular, \$5,969 for microwave sites, \$6,500 for PCS uses, and \$19,474 for CMRS/PMRS sites. Id. (3) The separate analysis of the 15-lease subset of the mountaintop leases indicates rates of \$3,000-\$7,500 for microwave uses, \$12,000-\$20,000 for FM/TV/Cellular sites, and \$8,000-\$29,000 for PMRS/CMRS sites. Id.

Yerke's ultimate conclusion, predicated upon the foregoing considerations, was that fair market value rental for sites on Cerro Gordo Peak should be \$6,500 for microwave uses, \$15,000 for cellular uses, and \$10,000 for CMRS/PMRS and FM/TV uses. (Appraisal at 44.) Apparently concluding

fn. 7 (Continued)

"an average rental rate from \$12,000-\$15,600 is sought for most of their sites." Id.

^{8/} The appraiser does not identify from which database these comparisons are derived.

that LPT uses the site for FM/TV use, Yerke assessed a base fair market rental of \$10,000. For "co-located users," Yerke stated that an average "co-located" user pays rental of "\$300-\$400 per month; 25% of this rate is roughly \$1,000 in annual rent." Id. at 45.

BLM's March 1, 1999, decision informed LPT that the appraised rental was based on the appraiser's determination that a fair market value for the site would require a "base rent of \$10,000 for cable [TV] plus 1 co-located use at \$1,000 per use." (Decision at 1.) The decision noted that the schedule rent for LPT's facility for 1999 was determined to be \$829.67; however, because the appraised rental of \$11,000 "exceed[ed] the schedule rent by more than 5 times," the appraised rental would be assessed. 9/

On March 12, 1999, BLM received a letter from LPT stating:

We are resubmitting the "User Inventory Worksheet" to reflect what is truly on Cerro Gordo. The "Worksheet" sent in October was in error.

[LPT] uses the Cerro Gordo Communications Site primarily as a Microwave link. The Broadcast Translator category was checked because we operate translators as a public service for people who have no other way to receive television. The cable television was checked because we are a cable television company, however the cable part of the business has nothing to do with this communication site.

Please accept these corrections and resubmit the form.

(Letter to BLM from Bruce Branson, Mar. 11, 1999.)

BLM received LPT's petition for stay on March 16, 1999, which BLM construed to be a notice of appeal. In it, LPT again requested BLM to "stay" the order because of hardship to LPT. By order dated July 13, 1999, the Board granted LPT's petition for stay, thereby relieving LPT of the requirement to pay the increased rental amount pending a final resolution of this appeal.

In its Statement of Reasons (SOR), LPT challenges BLM's categorization of its communication uses. LPT states that it currently uses the Cerro Gordo site to "retransmit television signals" using a microwave repeater system, and contends that "the only category that applies to us is Microwave." (SOR at 1.) LPT states it also operates broadcast translators "for the Los Angeles networks i.e., Ch 2 (CBS), Ch 4 (NBC), Ch 5 (KTLA), Ch 7 (ABC) and Las Vegas PBS Ch 10 (KLVX) * * * are transmitted over the valley where people can receive them by putting up a UHF antenna."

9/ According to a receipt for payment dated March 16, 1999, LPT remitted to BLM \$1,236 in rental for calendar year 1999.

Id. 10/ LPT also provides "emergency broadcast, local news, and information in addition to entertainment." Id. at 2.

Additionally, LPT owns a "small satellite dish and cable business." (SOR at 1.) However, LPT maintained previously to BLM that the "cable [television] part of the company has nothing to do with" the Cerro Gordo Peak site. (Mar. 11, 1999, LPT letter to BLM.) LPT claims that its user inventory report filed with BLM in October 1998 reported more uses than it actually has, since it circled "microwave, broadcast translator (LPTV) and Cable Television" uses. Id. LPT does not dispute that its facility also houses a tenant who provides CMRS services.

LPT alleges that, for a number of reasons, the appraisal is "fatally flawed." (SOR at 4.) LPT maintains that the appraiser did not perform a fair appraisal, because he failed to visit the site, omitted or misstated important information about the site and about Lone Pine, and relied on unsupported assumptions instead of obtaining available data and maps. Id. at 3, 4. LPT asserts that the appraisal misrepresents the site as near high volume traffic corridors and population centers, when, in actuality, it is "quite remote." Id. at 3. LPT claims that the appraisal improperly inflates rental value for sites serving small communities. Id. at 4. LPT asserts that it serves 640 people and operates on a \$50,000 budget. It contends that the Lone Pine community is "a town of 2000 people" and this population "has not increased in 40 years." Id. at 1. Accordingly, the Cerro Gordo site should not be compared with sites which serve "over a million people." Id. at 3. LPT alleges that the appraiser compared the site with dissimilar sites from high population areas, yet omitted from his lease analysis more "applicable" comparisons, which LPT claims to be 13 leases entered into between 1980 and 1984, at the time it received its right-of-way grant. Id. LPT faults the appraisal for failing to provide "complete data" concerning the other sites used for comparison. Id.

LPT claims that the 1987 appraisal for LPT's site, reversed by this Board in 1990, appraised the site at \$3,000, and, since schedule rentals were implemented in 1995, LPT has paid less than the 1987 appraised rental of \$3,000. (SOR at 2.) LPT maintains that the "367% increase" in rental "over the first appraisal" is unjustified in fact and shows error in the BLM's appraisal methodology. Id. at 2-3. According to LPT, this "will cause undue hardship on the applicant." In support of this assertion, LPT has submitted its 1998 Income Tax Return, Form 1120S. Id. Appendix B. LPT requests a waiver or reduction in rental pursuant to 43 CFR 2803.1-2(b) (2) due to undue hardship and/or its public service contributions. Additionally, LPT maintains that BLM regulations require that large increases in base rental payment be phased in over several years, presumably referring to 43 CFR 2803.1-2(d) (4). (SOR at 2.)

10/ LPT has consistently maintained that it operates the broadcast translators as a public service and at a financial loss. See Lone Pine Television, Inc., 113 IBLA at 268; SOR at 1.

In its Reply, BLM contends that, in light of information provided by LPT in the SOR, LPT's communication use is properly classified as a "television broadcast" service, plus two additional uses, "LPTV" and "CMRS." (BLM Reply at 2.) BLM maintains now that LPT's SOR requires recalculation of rental under the 1999 schedule. According to BLM's recalculation, the 1999 schedule rent is \$1,472.01. ^{11/} BLM maintains that the appraised value of \$11,000 still exceeds 5 X \$1,472.01; therefore, under 43 CFR 2803.1-2(d) (1) (iii), LPT's 1999 rental should remain at \$11,000. (Reply at 1-2.)

BLM further claims that "no request was received from the appellant for a reduction (or waiver) of rental payment prior to that which was included in the [SOR]. Therefore, a reduction of the rental payment was not considered." (Reply at 1-2.) BLM states that the "phase-in regulation" applies only to 1997 rental payments. *Id.* ^{12/} BLM defends in detail the Yerke Appraisal, *id.* at 3-5, concluding that "[t]he appellant has failed to demonstrate that the appraisal methods are in error, nor has the appellant offered his own appraisal in support of his appeal." *Id.* at 5.

[1] In appealing a BLM decision increasing a communication site rental rate based upon an appraisal, an appellant bears the burden of demonstrating by a preponderance of the evidence that BLM's appraisal methodology was erroneous, that BLM used inappropriate data or erred in its calculations, or that the annual rental arrived at deviated from the fair market value of the right-of-way. See *KHWY, Inc.*, 155 IBLA 6, 13 (2001); *Private Line Communications*, 143 IBLA 346, 352 (1998). Where BLM issues a decision setting a communications site rental pursuant to 43 CFR 2803.1-2(d) (7) (iv), it must ensure that its decision is supported by a rational basis and that such basis is stated in the written decision and is demonstrated in the administrative record accompanying the decision. *Kitchens Productions, Inc.*, 152 IBLA 336, 345 (2000). Where an appraisal or other method of determining rental value is found to be based upon erroneous or faulty methodology, or is lacking in sufficient detail to permit independent verification of the conclusions contained therein, BLM's decision is properly set aside and remanded. *Id.*

[2] While LPT has not provided its own appraisal, we find that arguments similar to those LPT raises against the appraisal of its fair market rental value have prevailed in other cases establishing rental by appraisal under 43 CFR 2803.1-2(d) (7) (iv). Particularly, this Board has

^{11/} LPT would be responsible for the total schedule rent of \$1,284.67 for the "television broadcast" use, and 25 percent of the schedule rent for LPTV (including microwave use) at \$107.06 X 25%, or \$26.76, and 25 percent of the schedule rent for the CMRS use of its tenant at \$642.33 X 25%, or \$160.58.

^{12/} BLM is correct that 43 CFR 2803.1-2(d) (4) only permits phase-in of rental increases over the 1996 rent, beginning in 1997; we address this issue no further because the 1997 rental year is not at issue.

reversed BLM decisions to eschew the schedule rental rates in favor of appraisal value if the underlying data on which the appraisal is based has not been disclosed in the appraisal, or has been kept confidential. In Kitchens Productions, Inc., 152 IBLA at 344, the Board stated:

This Board has previously addressed and rejected the claim that site-specific information reviewed by an appraiser to establish the fair market rental of a communication site right-of-way is confidential. Thus, in Mountain States Telephone & Telegraph Co., 107 IBLA 82, 89 (1989), we vacated and remanded BLM's Master Appraisal, stating:

We agree with Appellant, however, that the Master Appraisal is fatally flawed by the fact that it fails to disclose the location of private lease transactions and the parties thereto, such that Appellant could verify the data obtained.

Based on this analysis the Board rejected another appraisal premised on undisclosed data in KHWY, Inc., 155 IBLA at 14-15, and stated:

The recipient of the decision is entitled to a reasoned and factual explanation providing a basis for understanding and accepting the decision or, alternatively, for appealing and disputing it before the Board. Kitchens Productions, Inc., *supra* at 345, and cases cited therein. In this case, the failure to disclose is an error which compromises the appraisal process.

KHWY, Inc., 155 IBLA at 15-16.

The record appraisal in this case does not meet this test. The appraiser provided no specific information about any of the private leases used for comparison, claiming that such information was confidential. (Appraisal at 6, 32.) While the appraisal conducted broad studies of leases in the LAB, mountaintop leases in the State of California, and then small groups of five leases per type of use, it is not possible to tell in any of these analyses what leases were used or what pertinence they may have to the LPT site. Indeed, the appraisal implicitly acknowledges a lack of correspondence, when it considers 35 of the mountaintop leases that admittedly encompassed "broad areas which may not all be comparable with the subject property." *Id.* at 40.

The problem with lack of disclosure of the data bases is compounded by the fact that the appraisal covers three different rights-of-way held by different parties on Cerro Gordo Peak, yet provides insufficient reference to LPT's particular right-of-way. Indeed, the appraisal does not appear to clearly identify LPT's use at all. Rather, as best we can determine, the appraiser did not believe that LPT's particular use required detailed identification because he believes "differences between different uses"

are not relevant in developing a fair market value appraisal. (Appraisal at 32.) Yet the appraiser also acknowledged that use may be relevant to rental value "for high-power broadcast stations and no-profit or low-profit users." Id. at 33-34. Thus, it would seem imperative that the appraiser identify whether such an exception applies to LPT's specific use. He did not.

We are not persuaded by the appraiser's general statements, based on interviews with disinterested persons within the telecommunications industry, that the type of communications use to which a telecommunications right-of-way holder applies his grant, and the context within which he operates the grant, do not impact its rental value. As we pointed out in Kitchens Productions, Inc., 152 IBLA at 343-46, if an appraiser does not ascertain the relevant and material specifics of the property he is appraising, comparisons may not be valid. Further, even the appraisal at issue here established values based on different uses. See Appraisal at 41, Tables VI and VII.

The difficulties in accepting an appraisal with so little site data manifest themselves at every attempt to comprehend the appraisal. At the threshold level, the appraiser appears not to understand LPT's communication use. The appraiser conducted an aerial inspection of the property on September 16, 1997, but did not physically inspect the premises or ascertain the extent of improvements or whether the site is wired for electrical use. He apparently did not communicate with LPT to ascertain specific facts. 13/ The appraisal states, at 27, that LPT's use is "TV", and that its site is used for "telecommunications transmissions," but the appraiser does not identify whether LPT has a "cable television use," a "broadcast translator and/or low power television use" or a "television broadcast use." Later, the appraiser indicates that uses at Cerro Gordo Peak are confined to "microwave" and "FM broadcast." (Appraisal at 40.) Yet, the appraisal concludes that the rental value is \$10,000, a figure assessed for "FM/TV," id. at 44, based on a comparable market analysis of five leases for "FM/TV/Cellular" use. Id. at 41.

If LPT's use at Cerro Gordo Peak is properly defined as microwave use, as LPT asserts, the appraisal indicates at page 41 that LPT's site is overvalued. Using the appraisal, the annual lease rates for microwave

13/ This lack of data has led to LPT's factual arguments. LPT disputes the appraiser's conclusion that access was via a "maintained dirt road" (Appraisal at 25-26), and the appraisal's description of traffic studies estimating "6,000 vehicles per day on Highway 395 near the subject property." Id. LPT correctly notes that the appraisal waffles on whether there are co-located users, reporting a "co-located use" attributable to Westar Communications, who also holds a communications site right-of-way on Cerro Gordo Peak and, conversely, that there is no such use. (Appraisal at 25, 45.) BLM's March 1, 1999, decision assessed LPT \$1,000 in rental for one "co-located" use, based upon the appraiser's general analysis for such uses. (Decision at 1.)

leases, which have "the most common characteristics with the subject property," would range from approximately \$3,000 to \$7,500, with the resulting rental set at \$6,500. (Appraisal at 44.)

In reaching his final conclusion rating LPT's use "TV/FM," the appraiser did not explain his apparent classification of LPT's use as "TV" or, for that matter, what set of specifics such a "TV" rating represents. Moreover, assuming Yerke established that LPT's use is "TV," the appraisal does not indicate whether any of the five leases he reviewed for "FM/TV/Cellular" comparison in fact were "TV" leases. See Appraisal at 41. The appraisal states that none of the 35 mountaintop leases studied in detail were "TV" leases; if any of the LAB leases surveyed were similar to LPT's telecommunications uses, their similarities were not identified. Certainly, the record does not indicate that LPT provides cellular, PCS, CMRS, or PMRS services; however, much of the appraisal is concerned with fair market value for these uses. Thus, we are left to question whether the appraiser, in effect, determined LPT's rental value to be equivalent to a cellular rental value, without fair consideration of the specifics of LPT's actual use. 14/

BLM claims in its Reply that LPT has a "TV broadcast service," based upon LPT's statement in the SOR that it operates its broadcast translators on a UHF frequency. (Reply at 1.) BLM asserts that LPT's rental according to the 1999 schedule is, accordingly, \$1,472.01, as opposed to the \$829.62 originally assessed. Without more information, however, we are not convinced that BLM is justified in classifying LPT's UHF use as "TV broadcast service." The regulation at 43 CFR 2803.1-2(d) (1) (i) provides:

Television broadcast includes right-of-way facilities used to broadcast UHF and VHF audio and video signals for general public reception, and communication equipment directly related to the operation, maintenance, and monitoring of the use.
This category does not include holders licensed by the FCC to operate Low Power Television (LPTV) or rebroadcast devices such as translators, or transmitting devices such as microwave relays serving broadcast translators.

(Emphasis supplied.)

In its SOR, LPT maintains that it uses the site primarily for a microwave repeater service, but operates broadcast translators as a public service. (SOR at 1; see also LPT letter to BLM dated Mar. 11, 1999.) The Board is not in a position to make a determination in the first instance of LPT's category of use. The difficulty before us is that neither BLM nor the appraiser has ascertained, with any degree of specificity, the nature

14/ Indeed, as noted above, the appraisal relates discussions in which Airtouch Cellular quoted an "average rental for the typical cellular site" at between \$9,000 and \$12,000 annually. (Appraisal at 37.)

of LPT's communication use on Cerro Gordo Peak. ^{15/} Such a determination is critical to the appraisal's application.

A BLM decision increasing rental above the schedule rent because the appraised rent exceeds the schedule rent by more than a factor of five must be reversed where the appraisal fails to establish sufficient familiarity with the communications site being appraised and the communication uses on it. Kitchens Productions, Inc., 152 IBLA at 344 (appraiser failed to conduct on-the-ground inspection of property being appraised). Such an on-the-ground inspection, coupled with interviews of appropriate LPT staff and relevant follow-up research, including a review of LPT's FCC license(s), if necessary, would have yielded the information concerning the nature of LPT's use of the site necessary to conduct a fair market value appraisal. Accordingly, we hold that the appraisal before us does not establish with specificity necessary details of the right-of-way holder's communication use and the property being appraised.

LPT also challenges the appraisal on the basis that it demonstrates bias against using population as an indicator of value, thereby excluding relevant comparisons with leases serving similar-sized populations, and making improper comparisons with leases serving the LAB and other high density areas. LPT is correct that the appraiser generally discounts the use of population as a valid factor for assessing fair market value. (Appraisal at 33-34.) In fact, the LAB lease study within the appraisal resulted in an average value of \$9,400, lower than that chosen for LPT's rental value. Id. at 35. In Tables IX, X, and XI, at 43-44, as in all of the general analyses of sites in the appraisal, the appraiser seemingly compares Cerro Gordo Peak sites with 15 unidentified sites on this basis. As we stated earlier, the information presented in Tables IX, X, and XI is so vague as to prevent appellant or the Board from deriving any meaningful understanding of the conclusions drawn therefrom; we therefore are unable to discern whether and to what degree the appraiser used population as a relevant factor for comparison. See Kitchens Productions, Inc., 152 IBLA at 346-48 (unclear what population factors should have been considered).

The failure to identify facts pertaining to the LPT site makes it impossible for this Board to determine whether the appraiser's discounting of population was rational. In discussing general principles, the appraiser noted Cory's view that the extent to which population is relevant to fair market value rental depends in part on whether the site serves as an interconnecting node in a network system and whether "serving the population" is actually the function of the site." (Appraisal at 34.) It is thus incumbent upon the appraiser to explain how these indicators apply.

^{15/} Our review of BLM's application of the rental schedule rates to LPT's use since 1996 supports this conclusion. LPT has reported several types of uses on its user inventory, including "Cable TV," "television," "microwave," and "LPTV." BLM has assessed various schedule rates depending on the particular use reported at the time. BLM's rental schedule assumes a correct identification of the right-of-way holder's communication use.

As noted above, the appraisal does not indicate sufficient knowledge about the LPT site to answer these questions.

Moreover, the appraiser's discounting of population is somewhat at odds with the 1995 rulemaking change in 43 CFR 2803.1-2(d) establishing schedule rents. In the preamble, BLM stated generally that "population served" was relevant even in situations where the use itself is not necessarily tied to a specific population, because land values in high density areas "are generally higher than for those in less populated areas." 60 FR 57061 (Nov. 13, 1995). This conclusion coincides with the appraiser's view that real estate values are higher in high population density areas. (Appraisal at 32.) The contrast between the appraisal and the 1995 rulemaking logic is disturbing. We would require more analysis of factors relating to a particular site to uphold a determination that population is not relevant to its value.

LPT has argued, and the record confirms, that the LPT site is not near a metropolitan area and is in a low population region. LPT has raised a valid question about whether its site is properly compared with sites serving high populations, and whether its site functions to serve a limited population. Accordingly, any future appraisal of LPT's site on Cerro Gordo Peak must consider factors related to the site and the degree to which LPT in fact serves a limited population.

As in Kitchens, the appraiser has failed to reveal enough specifics about the comparables he surveyed to permit an independent assessment of whether those leases were in fact comparable to LPT's site. See Kitchens Productions, Inc., 152 IBLA at 344-45. In KYWY, Inc., 155 IBLA at 6, the Board also held that BLM may not rely on an appraisal for determining expected rent in accordance with 43 CFR 2801.1-2(d) (7) (iv), when that appraisal fails to disclose any information regarding the comparable data utilized, thereby precluding independent verification of the lease data, effective challenge as to the accuracy of the data and appraisal, and meaningful review by the Board. Thus, we reject the appraisal methodology before us.

[3] While we have rejected the appraisal, we must address BLM's determination that LPT should be assessed a rental of \$1,000 for its "co-located user." BLM added this amount to LPT's rental assessment based upon the following analysis in the appraisal report:

Since there is no market-driven mechanism in place where the lessee must divulge the rental rates of subtenants in the subject properties, a base rent is established; a base rent of \$1,000 per co-located user is adopted from our analysis. It is based on the assumption that the average, co-located user pays about \$300-\$400 per month; 25% of this rate is roughly \$1,000 in annual rent.

(Appraisal at 45.)

The appraiser and BLM, in adding \$1,000 in rent for an LPT tenant, appear to confuse the schedule rental rates established at 43 CFR 2803.1-2(d) (3) with accepted appraisal methodology for determining rental value. It is true that the schedule rent permits additional and incremental values to be added for tenants. The regulation at 43 CFR 2803.1-2(d) (7) establishes that, except in certain circumstances, BLM will use the schedule. If BLM uses the schedule, it chooses the principal use after identifying all uses and determining which use the schedule identifies as the most valuable use. It adds to this schedule amount 25 percent of the schedule value of each secondary "use." 43 CFR 2803.1-2(d) (3) .

However, if a determination is made under subsection (d) (7) (iv) that an appraisal is to be used, adding 25 percent of the value of other tenants' uses is no longer appropriate. Rather, Federal appraisal standards and precedent control. Federal appraisal standards give guidance for finding rental values, and they do not suggest that the method for calculating schedule rent is an appropriate measure of a fair market value appraisal. The Uniform Appraisal Standards for Federal Land Acquisitions (2000) describe relevant aspects of the "unit rule," as it has been called, as follows:

The first aspect of the unit rule requires that property be valued as a whole rather than by the sum of the values of the various interests into which it may have been carved, such as lessor and lessee, life tenant and remainderman, and mortgagor and mortgagee, etc. This is an application of the principle that it is the property, not the various interests, that is being acquired.

* * * * *

A second aspect of the unit rule is that different elements or components of a tract of land are not to be separately valued and added together. * * * Such a procedure results in a *summation* or *cumulative* appraisal, which is forbidden in appraisals for federal acquisitions, as it is in general real estate appraisal practice. The summation appraisal is an invalid procedure because the entire unit is being hypothetically sold in its entirety, not as separate parts individually.

Uniform Appraisal Standards for Federal Land Acquisitions (2000), at ¶ B-13.

In Yukon River Tours, 156 IBLA 1 (2001), the Board recently noted similar principles controlling fair market rental value for FLPMA rights-of-way, even while acknowledging differences between Federal land acquisition and rental value.

Fair market value rental reflects the amount "for which in all probability the right to use the site would be granted by a

knowledgeable owner willing but not obligated to grant to a knowledgeable user who desires but is not so obligated to use." Qwestar Services Corp., 119 IBLA 65, 67 (1991), citing American Telephone & Telegraph Co., 25 IBLA 341, 349-50 (1976); see also Wesfrac, Inc., 153 IBLA 164, 167 (2000). The appraisal defines the term similarly as the "amount in cash * * * for which in all probability the property would be sold by a knowledgeable owner, willing but not obligated to sell to a knowledgeable purchaser who desires but is not obligated to buy." (Appraisal at 3, citing Uniform Appraisal Standards for Federal Land Acquisition, 1992, (Uniform Appraisal Standards) at 3; see also Uniform Appraisal Standards, 2000, at B-2.) 3/

3/ While this Board has accepted the Uniform Appraisal Standards' definition of "fair market value," the Board has also noted complications in using the Standards, which were established for the purposes of ascertaining value of lands in Federal land acquisitions, for other purposes such as rental determinations. E.g., Northwest Pipeline Company, 84 IBLA 204, 214 (1984) (Burski, J., concurring).

Yukon River Tours, 156 IBLA at 8.

The appraisal at issue in this appeal does not explain any logic to its addition to the fair market rental value of 25 percent rental value per tenant or per tenant use. In the absence of an explanation that would square such a conclusion with established appraisal methodology, we can only guess that the motivation for the added rent for tenant use derived from the rental schedule approach. 16/ The rental schedule at 43 CFR 2803.1-2(d) (3) is an alternative to standard appraisals; it does not alter fair market value appraisal methodology. No hybrid appraisal is justified here.

[4] We turn to the issue of whether LPT should be accorded a waiver or reduction of rental under 43 CFR 2803.1-2(b) (2). That subsection authorizes waiver or reduction of rental if the right-of-way "holder provides without charge, or at reduced rates, a valuable benefit to the public" or if BLM "determines that the requirement to pay the full rental will cause undue hardship on the holder/applicant and that it is in the public interest to reduce or waive said rental." 43 CFR 2803.1-2(b) (2) (ii) and (iv). Over 10 years ago, this Board noted in Lone Pine Television, Inc., 113 IBLA at 269, that

16/ We note also that a provision that would have, when determining schedule rent, charged as rental 25 percent of the amount of rental received by a right-of-way from each of its tenants was rejected by the Department during rulemaking. 60 FR 57062 (Nov. 13, 1995).

BLM should consider LPT's eligibility for waiver or reduction of rental pursuant to 43 CFR 2803.1-2(b) (2) (ii). * * * BLM should specify which public service is the basis for any reduction or waiver granted; and for each alleged public service which BLM disallows as a basis for waiver or reduction, BLM should state the reasons for denial.

(citations omitted). ^{17/} In Lone Pine Television, Inc., IBLA 92-556 (Order dated Feb. 9, 1995, at 1-2), the Board again remanded a BLM appraisal of LPT's right-of-way rental reminding BLM to address those issues set forth in Lone Pine Television, Inc., 113 IBLA at 264, including LPT's request for waiver or reduction of rent.

Any future decision by BLM raising rental based upon such appraisal by BLM shall address whether LPT qualifies for reduction or waiver of rental. In making a hardship determination, BLM may demand particular information from LPT. 43 CFR 2803.1-2(b) (2) (iv). BLM should make all documentation concerning such determination part of the official record for purposes of appeal.

The last issue points out a difficulty inherent in attempting to resolve the issues in this appeal with any finality. Issues regarding the appraisal of LPT's right-of-way and LPT's ability to obtain a waiver or reduction of rental have been floating among the parties and the Board for 15 years. This decision remands those issues to BLM and thus they remain open. Several points are worthy of mention.

BLM has conducted three appraisals of the LPT site. As noted above, the rulemaking establishing the telecommunications rental schedule occurred as a result of problems with the United States' pre-existing inability to obtain fair market rental for telecommunications sites. A stated purpose of the rulemaking was to ensure that fair market value be obtained; BLM stated that the schedule sought to approximate fair market value. The rule at 43 CFR 2803.1-2(d) (7) allows use of appraisals to establish fair market rental value in lieu of the schedule rent, if such value is five times higher than the schedule rent, or if the site serves a population of a million people or more.

The general assumptions made in the appraisal regarding communications sites in the State of California tend to refute those behind the rulemaking. While the rulemaking states that the schedule rental attempts to approximate fair market value, the appraiser suggests disagreement with the rulemaking's premises regarding the relevance of population and location to value. While 43 CFR 2803.1-2(d) (7) (iv) makes clear that if the rental is undervalued by a factor of five, an appraisal may be used, something more about the site is needed than the appraiser's general difference

^{17/} The cited regulation was not altered by the 1995 rulemaking.

of opinion with the underpinning of BLM's own rulemaking. If BLM wishes to abandon the rule, it must do so by rule; it may not exempt Federal leases within the State of California from it. Thus, while an appraisal may justify diversion from the schedule rent, as explained above, the appraisal must explain why this particular site justifies a five-fold (or greater) increase in the schedule value, in some manner related to the site.

On the other hand, LPT has done little to comply with its obligation to clarify the precise use of and purpose served by of right-of-way CA 12457. The record shows that neither LPT nor BLM's appraiser has done much to settle this issue. LPT's changing arguments regarding its use appear opportunistic rather than informative. LPT has asked for hardship and public interest waivers for years, yet it is unclear whether LPT's operation justifies such a waiver. BLM memoranda in the file raise legitimate questions regarding whether LPT should be entitled to operate on a Federal right-of-way while consistently bearing the financial loss which it claims. If a holder's operation does not fit the public interest or hardship of 43 CFR 2803.1-2(b)(2), the holder's decision to operate at a loss does not nullify the obligation of the Federal government to collect rental for the site. LPT's continued failure to clearly identify its use and to justify its claims of hardship put LPT at considerable risk that it may not be able to afford the value of its right-of-way.

The right-of-way grant permits reevaluation as of November 2002. (Term and Condition 7.) Section 4(a), Executive Order 12988, Civil Justice Reform, 61 FR 4729, 4732 (Feb. 7, 1996), directed agencies, in order to promote just and efficient resolution of disputes and to the extent reasonable and practical, to implement the recommendations of the Administrative Conference of the United States (ACUS) entitled "Case Management as a Tool for Improving Agency Adjudications." 1 CFR 305.86-7 (1991). ACUS recommendation number 6 states that presiding officers "should promote party agreement and concessions on procedural and substantive issues, as well as on matters involving facts and documents" and that agencies should "encourage decisional officers to resolve cases (or parts thereof) informally." We are in no position to order BLM and LPT to meet to resolve their disputes. However, it appears to us that some form of joint consultation to resolve these issues, in the context of BLM's reevaluation of the right-of-way, would be in the interest of BLM and LPT, to avoid another time-consuming and expensive appeal. 18/

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed and remanded. BLM shall assess schedule rental in accor-

18/ LPT raises an argument regarding BLM's "permissive" use of a road, which LPT claims it maintains. (SOR at v.) LPT's assertion with regard to that road is unclear; in any event, the road does not pertain to the fair market value of the right-of-way and will not be considered here.

dance with 43 CFR 2803.1-2 unless and until it renders a determination pursuant to 43 CFR 2803.1-2(d) (7) (iv) consistent with this opinion.

Lisa Hemmer
Administrative Judge

I concur:

David L. Hughes
Administrative Judge